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II

Calendar No. 367

98TH CONGRESS
1ST SESSION

S. 774

[Report No. 98–221]

Entitled "The Freedom of Information Reform Act".

IN THE SENATE OF THE UNITED STATES

MARCH 11 (legislative day, MARCH 7), 1983

Mr. HATCH (for himself, Mr. THURMOND, and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

SEPTEMBER 12, 1983

Reported by Mr. THURMOND, with amendments

[Omit the part struck through and insert the part printed in italic]

A BILL

Entitled "The Freedom of Information Reform Act".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FEES AND WAIVERS

SEC. 2. Paragraph (4)(A) of section 552(a) of title 5, United States Code, is amended to read as follows:

"(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant

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to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedules shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies. Such regulations—

"(a) shall provide for the payment of all costs reasonably and directly attributable to responding to the request, which shall include reasonable standard charges for the costs of services by agency personnel in search, duplication, and other processing of the request. The term 'processing' does not include services of agency personnel in resolving issues of law and policy of general applicability which may be raised by a request, but does include services involved in examining records for possible withholding or deletions to carry out determinations of law or policy. Such regulations may also provide for standardized charges for categories of requests having similar processing costs,

"(b) shall provide that no fee is to be charged by any agency with respect to any request or series of related requests whenever the costs of routine collection

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and processing of the fee are likely to equal or exceed the amount of the fee, and

"(c) in the case of any request or series of related requests for records containing commercially valuable technological information which was generated or procured by the Government at substantial cost to the public, is likely to be used for a commercial purpose, and will deprive the Government of its commercial value, may provide for the charging of a fair value fee or royalties, or both, in addition to or in lieu of any processing fees otherwise chargeable, taking into account such factors as the estimated commercial value of the technological information, its costs to the Government, and any public interest in encouraging its utilization.

Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

"(ii) With respect to search and duplication charges, documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public and not the commercial or other private interests of the requester. With respect to all other charges, docu-

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ments shall be furnished without such charges where the agency determines that the information is not requested for a commercial use and the request is being made by or on behalf of (a) an individual, or educational, or noncommercial scientific institution, whose purpose is scholarly or scientific research; (b) a representative of the news media; or (c) a nonprofit group that intends to make the information available to the general public.

"(iii) One-half of the fees collected under this section shall be retained by the collecting agency to offset the costs of complying with this section. The remaining fees collected under this section shall be remitted to the Treasury's general fund as miscellaneous ~~receipts.~~ *receipts, except that any agency determined upon an investigation and report by the General Accounting Office or the Office of Management and Budget not to have been in substantial compliance with the applicable time limits of paragraph (6) of this subsection shall not thereafter retain any such fees until determined by the agency making such finding to be in substantial compliance.*".

TIME LIMITS

SEC. 3. Paragraph (6) of section 552(a) of title 5, United States Code, is amended to read as follows:

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"(6)(A) Except as otherwise provided in this paragraph, each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

"(i) determine within ten working days after the receipt of any such request whether to comply with such request and shall immediately notify the requester of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

"(ii) make a determination with respect to any appeal within twenty working days after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the requester of the provisions for judicial review of that determination under paragraph (4) of this subsection.

"(B) In unusual circumstances as defined in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in extensions of more than an aggregate of thirty working days. As used in this subparagraph, 'unusual circumstances'

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means, but only to the extent reasonably necessary to the proper processing of the particular request—

"(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

"(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request;

"(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein;

"(iv) a request which the head of the agency has specifically stated in writing cannot be processed within the time limits stated in paragraph (6)(A) without significantly obstructing or impairing the timely performance of a statutory agency function;

"(v) the need for notification of submitters of information and for consideration of any objections to disclosure made by such submitters; or

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"(vi) an unusually large volume of requests or appeals at an agency, creating a substantial backlog.

"(C) Any requester shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. An agency shall not be considered to have violated the otherwise applicable time limits until a court rules on the issue.

"(D) Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to the requester, subject to the provisions of paragraph (7). Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

"(E) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, by which a requester who demonstrates a compelling need for expedited access to records shall be given expedited access.".

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BUSINESS CONFIDENTIALITY PROCEDURES

SEC. 4. Section 552(a) of title 5, United States Code, is amended by adding after paragraph (6) the following new paragraph:

"(7)(A) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying procedures by which—

"(i) a submitter may be required to designate, at the time it submits or provides to the agency or thereafter, any information consisting of trade secrets, or commercial, research, financial, or business information which is exempt from disclosure under subsection (b)(4);

"(ii) the agency shall notify the submitter that a request has been made for information provided by the submitter, within ten working days after the receipt of such request, and shall describe the nature and scope of the request and advise the submitter of his right to submit written objections in response to the request;

"(iii) the submitter may, within ten working days of the forwarding of such notification, submit to the agency written objection to such disclosure, specifying all grounds upon which it is contended that the information should not be disclosed; and

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"(iv) the agency shall notify the submitter of any final decision regarding the release of such information.

"(B) An agency is not required to notify a submitter pursuant to subparagraph (A) if—

"(i) the information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to subparagraph (A)(i), if such designation is required by the agency;

"(ii) the agency determines, prior to giving such notice, that the request should be denied;

"(iii) the disclosure is required by law (other than this section) and the agency notified the submitter of the disclosure requirement prior to the submission of the information;

"(iv) the information lawfully has been published or otherwise made available to the public; or

"(v) the agency is a criminal law enforcement agency that acquired the information in the course of a lawful investigation of possible violations of criminal law.

"(C) Whenever an agency notifies a submitter of the receipt of a request pursuant to subparagraph (A), the agency shall notify the requester that the request is subject to the provisions of this paragraph and that notice of the request is

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being given to a submitter. Whenever an agency notifies a submitter of final decision pursuant to subparagraph (A), the agency shall at the same time notify the requester of such final decision.

"(D) Whenever a submitter has filed objections to disclosure of information pursuant to subparagraph (A)(iii), the agency shall not disclose any such information for ten working days after notice of the final decision to release the requested information has been forwarded to the submitter.

"(E) The agency's disposition of the request and the submitter's objections shall be subject to judicial review pursuant to paragraph (4) of this subsection. If a requester files a complaint under this section, the administrative remedies of a submitter of information contained in the requested records shall be deemed to have been exhausted.

"(F) Nothing in this paragraph shall be construed to be in derogation of any other rights established by law protecting the confidentiality of private information.".

JUDICIAL REVIEW

SEC. 5. Section 552(a)(4) of title 5, United States Code, is amended—

(1) by amending subparagraph (B) to read as follows:

"(B) On complaint filed by a requester within one hundred and eighty days from the date of final agency action or

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by a submitter after a final decision to disclose submitted information but prior to its release, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction—

"(i) to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the requester;

"(ii) to enjoin the agency from any disclosure of records which was objected to by a submitter under paragraph (7)(A)(iii) or which would have been objected to had notice been given as required by paragraph (7)(A)(i); or

"(iii) to enjoin the agency from failing to perform its duties under sections (a) (1) and (2).".

(2) by redesignating subparagraphs (C), (D), (E), (F), and (G) as subparagraphs (F), (G), (H), (I), and (J), respectively, and by adding after subparagraph (B) the following new subparagraphs:

"(C) In an action based on a complaint—

"(i) by a requester, the court shall have jurisdiction over any submitter of information contained in the requested records, and any such submitter may intervene as of right in the action; and

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"(ii) by a submitter, the court shall have jurisdiction over any requester of records containing information which the submitter seeks to have withheld, and any such requester may intervene as of right in the action.

"(D) The agency that is the subject of the complaint shall promptly, upon service of a complaint—

"(i) seeking the production of records, notify each submitter of information contained in the requested records that the complaint was filed; and

"(ii) seeking the withholding of records, notify each requester of the records that the complaint was filed.

"(E) In any case to enjoin the withholding or the disclosure of records, or the failure to comply with subsection (a) (1) or (2), the court shall determine the matter de novo. The court may examine the contents of requested agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section. The burden is on the agency to sustain its action to withhold information and the burden is on any submitter seeking the withholding of information."; and

(3) in redesignated subparagraph (H)—

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(A) by adding "or any submitter who is a party to the litigation" after "United States"; and

(B) by striking out "complainant" and inserting in lieu thereof "requester".

PUBLIC RECORD REQUESTS

SEC. 6. Section 552(a) of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(8) In any instance in which a portion of the records requested under this subsection consists of newspaper clippings, magazine articles, or any other item which is a public record or otherwise available in public records, the agency may offer the requester a choice of (A) furnishing the requester with an index identifying such clippings, articles, or other items by date and source, provided that such index is already in existence, or (B) notwithstanding the waiver requirements contained in this section, furnishing the requester with copies of such clippings, articles, or other items at the reasonable standard charge for duplication established in the agency's fee schedule.".

CLARIFY EXEMPTIONS

SEC. 7. So much of section 552(b) of title 5, United States Code, as precedes paragraph (1) thereof is amended to read as follows:

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"(b) The compulsory disclosure requirements of this section do not apply to matters that are—".

MANUALS AND EXAMINATION MATERIALS

SEC. 8. Section 552(b)(2) of title 5, United States Code, is amended by inserting a comma in lieu of the semicolon at the end thereof and adding the following: "including such materials as (A) manuals and instructions to investigators, inspectors, auditors, or negotiators, to the extent that disclosure of such manuals and instructions could reasonably be expected to jeopardize investigations, inspections, audits, or negotiations, and (B) examination material used solely to determine individual qualifications for employment, promotion, or licensing to the extent that disclosure could reasonably be expected to compromise the objectivity or fairness of the examination process;".

PERSONAL PRIVACY

SEC. 9. Section 552(b)(6) of title 5, United States Code, is amended to read as follows:

"(6) records or information concerning individuals, including compilations or lists of names and addresses that could be used for solicitation purposes, the release of which could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy;".

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LAW ENFORCEMENT

SEC. 10. (a) Section 552(b)(7) of title 5, United States Code, is amended to read as follows:

"(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) ~~would~~ *could reasonably be expected to* constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected

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to endanger the life or physical safety of any natural person;".

(b) Section 552(a) of title 5, United States Code, is amended by adding after paragraph (8) thereof the following new paragraph:

"(9) Nothing in this section shall be deemed applicable in any way to the informant records maintained by a law enforcement agency under an informant's name or personal identifier, whenever access to such records is sought by a third party according to the informant's name or personal identifier.".

ADDITIONAL EXEMPTIONS

SEC. 11. Section 552(b) of title 5, United States Code, is amended by striking out "or" at the end of paragraph (8), by striking out the period at the end of paragraph (9) and inserting in lieu thereof a semicolon, and by adding the following new paragraphs after paragraph (9):

"(10) technical data that may not be exported lawfully outside the United States without an approval, authorization, or a license under Federal export laws, except that this section shall apply to such data if regulations promulgated under such laws authorize the export of such data without restriction to any person and any destination; or

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"(11) records or information maintained or originated by the Secret Service in connection with its protective functions to the extent that the production of such records or information could reasonably be expected to adversely affect the Service's ability to perform its protective functions.".

REASONABLY SEGREGABLE

SEC. 12. Section 552(b) of title 5, United States Code, is amended by adding after the last sentence thereof the following: "In determining which portions are reasonably segregable in the case of records containing material covered by paragraph (1) or (7) of this subsection, the agency may consider whether the disclosure of particular information would, in the context of other information available to the requester, cause the harm specified in such paragraph.".

PROPER REQUESTS

SEC. 13. Section 552(a)(3) of title 5, United States Code, is amended to read as follows:

"(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request by a requester who is a United States person for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be

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followed, shall make the records promptly available to the requester.

"(B) The time limits prescribed in subparagraph (A) of paragraph 6 shall be tolled whenever the requester (or any person on whose behalf the request is made) is a party to any ongoing judicial proceeding or administrative adjudication in which the Government is also a party and may be requested to produce the records sought. Nothing in this subparagraph shall be construed to bar (i) a request for any records which are not related to the subject matter of such pending proceeding, or (ii) a request for any records which have been denied to a party in the course of a judicial proceeding or administrative adjudication that is no longer pending.

"(C) The Attorney General, in accordance with public rulemaking procedures set forth in section 553 of this title, may by regulation prescribe such limitations or conditions on the extent to which and on the circumstances or manner in which records requested under this paragraph or under section 552a of this title shall be made available to requesters who are persons imprisoned under sentence for a felony under Federal or State law or who are reasonably believed to be requesting records on behalf of such persons, as he finds to be (i) appropriate in the interests of law enforcement, or foreign relations or national defense, or of the efficient adminis-

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tration of this section, and (ii) not in derogation of the public information purposes of this section.".

ORGANIZED CRIME

SEC. 14. Section 552 of title 5, United States Code, is amended by adding a new subsection (c) as follows and redesignating the current subsections (c), (d), and (e) as (d), (e), and (f) respectively.

"(c) Nothing in this section shall be deemed applicable to documents compiled in any lawful investigation of organized crime, designated by the Attorney General for the purposes of this subsection and conducted by a criminal law enforcement authority for law enforcement purposes, if the requested document was first generated or acquired by such law enforcement authority within five years of the date of the request, except where the agency determines pursuant to regulations promulgated by the Attorney General that there is an overriding public interest in earlier disclosure or in longer exclusion not to exceed three years. Notwithstanding any other provision of law, no document described in the preceding sentence may be destroyed or otherwise disposed of until the document is available for disclosure in accordance with subsections (a) and (b) of this section for a period of not less than ten years.".

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REPORTING UNIFORMITY

SEC. 15. Section 552(e) of title 5, United States Code (as redesignated), is amended—

(1) by striking out "calendar" the second and fourth places it appears and inserting in lieu thereof "fiscal";

(2) by striking out "March" each place it appears and inserting in lieu thereof "December";

(3) in paragraph (4), by striking out "subsection (a)(4)(F)" and inserting in lieu thereof "subsection (a)(4)(I)"; and

(4) in the next to last sentence, by striking out "subsections (a)(4) (E), (F), and (G)" and inserting in lieu thereof "subsections (a)(4) (H), (I), and (J)".

TECHNICAL DATA PROCEDURES

SEC. 16. Title 5 of United States Code is amended by adding after section 559 a new section 560 as follows:

"SEC. 560. Each Federal agency maintaining technical data exempt under subsection (b)(10) of section 552 of this title shall promulgate regulations establishing registration (including certification) procedures and criteria under which qualified United States individuals and business concerns may obtain copies of such Government-owned technical data for purposes of bidding on Government contracts. No data ob-

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tained under such procedures may be redisseminated or exported except as provided by law.".

DEFINITIONS

SEC. 17. Section 552(f) of title 5, United States Code (as redesignated), is amended to read as follows:

"(f) For purposes of this section—

"(1) 'agency' means any executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

"(2) 'submitter' means any person who has submitted to an agency (other than an intelligence agency), or provided an agency access to, trade secrets, or commercial, research, or financial information (other than personal financial information) in which the person has a commercial or proprietary interest;

"(3) 'requester' means any person who makes or causes to be made, or on whose behalf is made, a proper request for disclosure of records under subsection (a);

"(4) 'United States person' means a citizen of the United States or an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the

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Immigration and Nationality Act, 8 U.S.C. 1101(a)(20)), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association that is a foreign power, as defined in section 101(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(a));

"(5) 'working days' means every day excluding Saturdays, Sundays, and Federal legal holidays; and

"(6) 'organized crime' means those structured and disciplined associations of individuals or of groups of individuals who are associated for the purpose of obtaining monetary or commercial gains or profits, wholly or in part by illegal means, while generally seeking to protect and promote their activities through a pattern of graft or corruption, and whose associations generally exhibits the following characteristics:

"(A) their illegal activities are conspiratorial,

"(B) in at least part of their activities, they commit acts of violence or other acts which are likely to intimidate,

"(C) they conduct their activities in a methodical or systematic and in a secret fashion,

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"(D) they insulate their leadership from direct involvement in illegal activities by their organizational structure,

"(E) they attempt to gain influence in government, politics, and commerce through corruption, graft, and illegitimate means, and

"(F) they engage in patently illegal enterprises such as dealing in drugs, gambling, loansharking, labor racketeering, or the investment of illegally obtained funds in legitimate businesses.".

PUBLICATION OF EXEMPTION 3 STATUTES

SEC. 18. Section 552 of title 5, United States Code, is amended by adding a new subsection (g) as follows:

"(g) Within two hundred and seventy days of the date of the enactment of this subsection, any agency which relies or intends to rely on any statute which was enacted prior to the date of enactment of this subsection, or during the thirty-day period after such date to withhold information under subsection (b)(3) of this section, shall cause to be published in the Federal Register a list of all such statutes and a description of the scope of the information covered. The Justice Department shall also publish a final compilation of all such listings in the Federal Register upon the completion of the two-hundred-and-seventy-day period described in the preceding sentence. No agency may rely, after two hundred and

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seventy days after the date of enactment of this subsection, on any such statute not listed in denying a request. Nothing in this subsection shall affect existing rights of any party other than an agency.".

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Entitled "The Freedom of Information Reform Act".

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